Supreme Court, U.S.
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NO.

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1998

LOUIS R. KOERNER, JR. and MICHAEL SAMPSON, SR.

Petitioner,

VERSUS

CRESCENT CITY EMERGENCY MEDICAL SERVICES, INC., d/b/a MEDIC ONE; MEDIC ONE AMBULANCE SERVICE, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY; SUE BIROU, BONNIE EDWARDS

Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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85 pp

## QUESTIONS PRESENTED FOR REVIEW

1. The court of appeal awarded the sanction of double costs and attorneys fees. However and according to the advisory committee notes to Rule 38, such sanctions may not be awarded without a separately filed motion or notice, neither of which were present in this case. See Fed. R. App. P. 38, advisory committee's note (1994 Amendment).

2. Given the compliance by petitioner with the procedure which had been previously been approved in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1016, 1018 (10th Cir. 1994), which was specifically excluded from the holding in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451-452 and footnote 3 (5th Cir. 1995) and was not prohibited by the court of appeal, petitioner's appeal was not frivolous and should have been fully considered by the court of appeal and not dismissed without such consideration.

3. There is a conflict between the decision of the Fifth Circuit Court of Appeal in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) not only with *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1994), but with cases from other circuits on the issue of original source. See *Hagood v. Sonoma County*

*Water Agency*, C.A.9 (Cal.) 1996, 81 F.3d 1465, 1475-75, certiorari denied 117 S.Ct. 175, 136 L.Ed.2d 116, rehearing denied 117 S.Ct. 501; *U.S. ex rel. Siller v. Becton Dickinson & Co. By and Through Microbiology Systems Div.*, C.A.4 (Md.) 1994, 21 F.3d 1339, 1347, certiorari denied 115 S.Ct. 316, 130 L.Ed.2d 278; *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 (C.A.11 (Fla.) 1994); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657, 304 U.S.App.D.C. 347 (C.A.D.C.1994); *U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 737-38 (C.A.3 1997).

4. There is a conflict between the decision of the court of appeal, approving the actions of the district court and its summary dismissal and resolution of the factual issue of original source without a full evidentiary hearing, with *Steel Company v. Citizens For A Better Environment*, 118 S. Ct. 1003; 1998 U.S. LEXIS 1601; 140 L. Ed. 2d 210 (1998) and with cases from other circuits construing subject matter jurisdiction in a similar factual and legal situation. *U.S. ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940 (C.A.7 (Wis.) 1996). Please also see *Wyke v. Polk County School Bd.*, 129 F.3d 560, 568 (C.A.11 (Fla.) 1997); *Monsky v. Moraghan*, 127 F.3d 243, 245 (C.A.2 (Conn.) 1997); *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-25 (C.A.D.C. 1997) in that the averments of the complaint, testimony, and affidavits must be considered.

5. The imposition by the court of appeal on rehearing of sanctions in an amount approximately one-third the amount of the sanctions granted by the district court (the precise amount requested) suggests that petitioner's appeal on the amount of sanctions was well grounded and not frivolous.

## PARTIES TO THIS PROCEEDING

**Petitioner/Relator:**

Michael Sampson

**Petitioner/Counsel for Relator**

Louis R. Koerner, Jr.

**Counsel for Petitioners:**

Louis R. Koerner, Jr.

**Defendants/Respondents:**

Crescent City Emergency Medical Service, Inc., d/b/a Medic One, Medic One Ambulance Services, Inc., Jerry Varanay, and Sue Birou, American Medical Response, Inc.

**Counsel for Respondents:**

William D. Aaron, Jr. and Nancy Eleanor Graham of Phelps Dunbar, LLP, attorneys for Medic One Ambulance Services, Inc. and American Medical Response, Inc.

Julian R. Murray, Jr., Cherhardy, Sherman, Ellis, Breslin & Murray, attorneys for Crescent City Emergency Medical Service, Inc., d/b/a Medic One

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TRIAL COURT:

*United States of America, ex rel Michael Sampson* C.A. No. 96-3505-A (United States District Court, Eastern District of Louisiana, 1997 U.S. Dist. LEXIS 14147, September 12, 1997 Opinion: Ruling On Motions For Dismissal/Sanctions). A-7-32.

*United States of America, ex rel Michael Sampson* C.A. No. 96-3505-A (United States District Court, Eastern District of Louisiana, 1997 U.S. Dist. LEXIS 18400. November 12, 1997. Opinion: Ruling on Applications For Attorneys' Fees and Costs Imposed As Rule 11 Sanctions) A-33-44.

APPELLATE COURT:

1. *United States of America, ex rel Michael Sampson* (Fifth Circuit, 97-31039 & 97-31309, September 18, 1998) (Decision without Published Opinion) A-1-4.

2. *United States of America, ex rel Michael Sampson* (Fifth Circuit, 97-31039 & 97-31309, October 23, 1998) (Decision without Published Opinion), Rehearing granted. A-4-6.

## GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. §§ 1254(1), 2101(c). The United States Court of Appeals for the Fifth Circuit rendered the decision below on September 18, 1998 and granted the application for rehearing on October 23, 1998.

## STATUTES INVOLVED

**31 USC § 3730(d)(1):**

> Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

**31 U.S.C. § 3730(d)(2):**

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

**31 U.S.C. § 3730(e)(4)**

(e) **Certain actions barred.**-- ....

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

**Federal Rules of Civil Procedure Rule 11(b-c) Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions**

(b) Representations to Court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension,

modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the

court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys'

fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(13) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

**Federal Rule of Appellate Procedure Rule 38. Frivolous Appeal. – Damage and Costs**

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice form the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

## STATEMENT OF THE CASE

On September 13, 1996 and following the district court's ruling in a previous case (Koerner II) that the material previously supplied to the United States under cover of letter of February 16, 1995, was not furnished by Michael Sampson, Petitioner Koerner, an attorney at law and on behalf of Mr. Sampson, again provided this information, a copy of the district court's memorandum opinion, and the previous correspondence to Michael Hertz, Director, Commercial Litigation Branch, United States Department of Justice by letter of September 13, 1996. On September 18, 1996, Mr. Hertz responded, acknowledging receipt and acknowledging that the attachments were identical to those previously received. This constituted compliance with the provisions of 31 U.S.C. § 3730(e)(4), requiring that, in the event of previously disclosed material, the relator who was the original source provide a copy of such material to the United States prior to filing his complaint.

On October 28, 1996 and after compliance with the requirements necessary to establish subject matter jurisdiction, the complaint herein was filed under seal. On May 8, 1997, an order was issued unsealing the complaint and permitting service of summons and complaint.

On July 15, 1997, Medic One Ambulance, Inc., et al. (the AMR defendants) filed "Defenses and Answer to Complaint, contending that Michael Sampson was not "the original source," that the information on which he relied was "previously disclosed" in the Federal Recovery and other litigations, that the claims of Sampson were settled by the settlement in the Federal Recovery case, and that the personal knowledge of Sampson as to the actions of this defendant was ended prior to AMR's acquisition of the ambulance-related assets of Medic One.

On July 14, 1997, Medic One filed "Exceptions and Answer to the Complaint" in which they raised similar defenses. Medic One did not claim that Sampson had no cause of action because Medic One was the holder of the Medicare Part B permit and therefore bound by the conditions imposed by the Federal Medicare laws and regulations.

There was no evidentiary material filed. Neither any acquisition information nor the settlement documents were filed.

Solely the motions for sanctions followed. On behalf of Sampson, Koerner filed an opposition to the motion in which it was contended that sanctions were inappropriate because there was subject matter jurisdiction because Sampson was an original source who had fully complied with 31 U.S.C. § 3730(e)(4) in a procedure which had been previously been ap-

procedure which had been previously been approved in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1016, 1018 (10th Cir. 1994), was specifically excluded from the holding in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451-452 and n. 3 (5th Cir. 1995), and was not prohibited by the Fifth Circuit Court of Appeals.

Without specifically considering this argument,[1] the district court entered a the final judgments on September 15, 1997 dismissing Sampson's complaint and its Ruling on Motion for Dismissal/Sanctions of September 15, 1997 (A-7-32).

In like manner and despite a substantial opposition filed by Koerner, the district court granted judgment on November 10, 1997 and entered its Ruling on Applications for Attorney's fees and costs imposed as Rule 11 Sanctions (A-33-44) for the precise amount of the sanctions requested by respondents.

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[1] The district court characterized them as an attempt "to obfuscate the issues" and "present utterly preposterous arguments." It attempted at p. 16 to distinguish *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 (C.A.11 (Fla.) 1994) by stating that Sampson did not notify the government until six years after public disclosure via the first public disclosure by Priority E.M.S., Inc. in state court. This was clearly erroneous.

The court of appeal did not meet the substance of any of petitioners' arguments but rather dismissed the appeal as frivolous and remanded for imposition of sanctions (September 18, 1998, A-1-4), although no motion for sanctions had been filed and no request for sanctions had been made by respondents.

Petitioners filed for rehearing, requesting that sanctions be entered by the court of appeal because of the prejudice that would be encountered in the district court and the lack of any effective remedy by appeal, since any further appeal would likely also be dismissed as frivolous whatever its merit. Rehearing was granted (October 23, 1998, A-4-6), and a precise amount of sanctions granted that was approximately one third of that granted by the district court.

## STATEMENT OF NECESSARY FACTS

During the period of June of 1993 through August of 1994, Medic One was the contractor for the emergency and non-emergency ambulance transport of patients at Charity Hospital of Louisiana who were in need of and qualified for such transport. The complaint alleges a scheme between Bonnie Edwards, in her capacity as Director of Admissions of Charity Hospital, and the Medic One defendants by which Medic One would provide ambulance transports to Charity patients which were not medically necessary

and were false and/or fraudulent under the Medicare and Medicaid laws, rules and regulations.

Medicare/Medicaid regulations do not permit reimbursement for Charity Hospital patients unless the medical condition was such that the patients were bedridden and the use of any other method of transport was contraindicated or no other method of transport could be used without endangering the patient's health. However, Medic One, throughout a period beginning no later than June, 1993 to the personal knowledge of Michael Sampson, Sr. and continuing throughout Sampson's employment made false claims on account of unnecessary transports at Charity assigned by Bonnie Edwards.

According to ¶ 16, the method by which this scheme was implemented at Charity and hidden from the United States was as follows:

a. Bonnie Edwards or her staff would issue an Ambulance Request Form in which the average of ten to thirteen patients per day were released to Medic One for transport;

b. One of the two Medic One employees selected to be the Charity Coordinators would receive the Ambulance Request Form and would determine whether the patient had a Medicare or Medicaid number or private insurance;

c. If the patient lacked a Medicare or Medicaid number or private insurance, Medic One employees would report back to Edwards for instructions because Charity was required to pay for ambulance transport. On most occasions in which these patients, who lacked a Medicare or Medicaid number or private insurance, were not eligible under the applicable regulations for transport, alternative means of transport would be found.

d. If the patient had a Medicare or Medicaid number or private insurance, the Medic One employees would report the physical condition of the patient and this information to Medic One Dispatch in order to receive instructions as to whether or not to arrange for Medic One transport.

e. Although only about one in four patients had a medical condition that qualified them for compensated transport, on almost every occasion, the Medic One employees would authorize the transport, even though the physical condition of the patient was clearly disclosed to them and they knew such transport was fraudulent within the regulations.

f. The Medic One coordinators, both the non-EMT (relator) and EMT, would seek to obtain the signature of a physician on the form.

Medic One made payments to Ms. Edwards for her assistance in providing transport referrals to Medic One that could be billed to the United States. This was the final link in the "Charity Transport Bribery Scheme." Much more detail is provided in Mr. Sampson's affidavit, R83-90, RE-46-53 and the attachments, R-91-140, which were furnished to the United States prior to filing the complaint, and in his testimony before Judge Schwartz on August 28, 1996.

After the filing of the original *qui tam* action against Crescent City E.M.S, Inc. described in the *Federal Recovery* case and while that case was on appeal, Michael Sampson approached petitioner, Louis R. Koerner, Jr., one of the counsel in the FRS case, and provided him information, later placed in an affidavit and other material submitted to the United States, of a false claims conspiracy involving Charity Hospital of Louisiana of which he had himself personal knowledge and as to which he had observed bribery payment and arrangements for false claims.

This information demonstrated a scheme to defraud the United States by means of bribery of a supervisory employee of Charity Hospital of Louisiana

in order to obtain transports of Charity Hospital patients that were not medically qualified for Medicare or Medicaid reimbursement because they were not bedridden. These patients, who were identified by name in the documents submitted to the United States and in the affidavit prepared by Sampson, were transported between June of 1993 and August of 1994.

These patients were later in time and different in type from those alleged in the *Federal Recovery Services, Inc.* case.[2] Each time these patients were improperly transported, this produced an additional false claim. By the time that Mr. Sampson had come to Koerner, Judge Schwartz, the district judge in this case, had dismissed the *Federal Recovery Services, Inc.* case on account of a compromise between the United States and Crescent City E.M.S., Inc. The United States had intervened in the *Federal Recovery Services, Inc.* before Mr. Sampson had begun to work for Medic One at Charity Hospital.

Koerner reviewed the material provided by Sampson, prepared an affidavit for Sampson to sign, forwarded a copy of all of this material in Sampson's name and with a Sampson caption to the United States on February 16, 1996, the receipt of which was

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[2] Referred to by the court of appeal as Koerner I and filed in 1991, see A-15, and long before Sampson's employment.

acknowledged on February 27, 1995, and prepared a complaint in the name of Michael Sampson. When Mr. Sampson failed to authorize the filing of the *qui tam* complaint, his attorney, petitioner Louis R. Koerner, Jr., believing that he had a professional obligation to formally bring these serious allegations to the attention of the United States, filed a complaint in his own name, hoping to later convince Mr. Sampson to rejoin the complaint as relator.

Although Mr. Sampson did rejoin the case as relator, the district court refused to acknowledge this or permit Mr. Sampson to be a party, dismissing the complaint.

In the Koerner II case, there was a hearing on the motion of defendants to dismiss on August 28, 1996. At that time and despite the refusal of the district court to permit the necessary inquiry into the "merits", Sampson provided detail additional to that in his affidavit that demonstrated he was an original source.

In his affidavit, Mr. Sampson had stated that what he was thereafter describing was his personal knowledge. In paragraphs 4-20, Mr. Sampson described how the scheme to defraud the United States worked and identifies the employees at Medic One who were involved. He also identifies certain patients. This identification is amplified in the documents attached to the complaint with Mr. Sampson's notes that a par-

ticular patient was a person who walked or who was capable of walking. These are the patients who are identified in the complaint.

At the hearing before the district court in the Koerner matter, Mr. Sampson demonstrated his personal knowledge and that he was an original source.

Q Did you have a discussion with your supervisor concerning whether these patients were bedridden or not?

A Yes.

Q Tell us about that.

A We would call over the telephone and tell them what the patient's diagnosis is, whatever, and what type of a patient and would transport them and what condition they are in.

Q And what would happen then?

A Then they would decide what type of a unit that would be sent out to pick this patient up. But most importantly they want to know who is paying for it.

Q What were the names of the people at MEDIC ONE if you can recall that you dealt with on that?

A Okay, in the control room it was a supervisor there by the name of Vincent was the supervi-

sor/operator. At that time he was in charge of all. And let me see, one name is Jody, and also what's our manager, Robert, which was Lawdy Medina; operations manager, Bruce Byfield.[3]

He was asked by Mr. Aaron:

Q In the lawsuit it is alleged that this was a bribery scheme. Did you personally witness acts of bribery?

A Yes.[4]

The statement by the district court at A-17, n. 10 that: "As previously mentioned the Court notes that prior to contacting Koerner, Sampson admitted contacting Boatright and discussing his prior medicare fraud allegations." This is, at best, a misleading summary of what Mr. Sampson said at pages 50-51.[5]

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[3] TR 8/26/96 at 32-33.

[4] TR 8/26/96 at 52.

[5] Q I am a bit confused. How did you first hear of Mr. Boatright?
A I heard of Mr. Boatright through other employees that felt what happened to me, I was being misused, and they explained to me the situation where someone that has experience that you go and talk to and maybe something you can do something about it.
Q Did Mr. Boatright discuss his prior lawsuit with you?

Based on Michael Sampson's statement on cross examination, although clarified on redirect examination, that he had not personally given information to

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A Not in direct, no. He explained to me that he have a little dealings with MEDIC in the past previously. And I told him I had heard something in relation to that. I described to him my problem what I have had.

Q You said you had some dealings. Explain that for me. I don't understand what you mean.

A Well, for one thing he had dealings with MEDIC ONE prior to some, which occasioned my attention, Medicaid fraud.

Q You specifically discussed Medicaid fraud with Mr. Boatright, is that right?

A Yes.

Q And he specifically told you that he filed a previous lawsuit against Crescent City and MEDIC ONE involving Medicaid fraud, correct?

A Yes.

Q After you had this conversation with Mr. Boatright, it was then that you approached Mr. Koerner?

A Yes, I did.

Q So you had made no approaches to the Government or to Mr. Koerner prior to your discussions about Medicaid fraud and prior lawsuit with Mr. Boatright, is that correct?

A That's correct.

Q Mr. Boatright indicated to you that you possibly could file a lawsuit similar to the one that he had previously filed?

A He didn't really indicate it. He just stated he had no idea of knowing. But he would refer me to someone that might be able to help me, assist me in this matter. He didn't directly that we said it that way.

the United States[6] until after suit was filed,[7] the district court found that this information had not been provided to the United States prior to filing suit. This was also incorrect.

Although the district court found that Sampson did not apprise Government officials of any wrongdoing until September of 1996, by means of another letter sent containing the same information as the February 16, 1995 letter, this is belied by the language of the response of the United States, through Michael Hertz, acknowledging that this information was the same as that disclosed at that time and thereafter sent with the *qui tam* complaint in March of 1995.

In the interim, and relying on the procedure established by the court of appeal for the 10th Circuit in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1016, 1018 (10th Cir. 1994), Koerner renotified the United States and sent additional copies of the original source material. Armed with that acknowledgement, a new complaint was filed in the name of Sampson.

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[6] The material had been submitted in his name by his attorney, Koerner.

[7] Tr.21, 25, 26, 34, 42, and 56.

The respondents, defendants below, did not file a motion to dismiss for lack of subject matter jurisdiction, although they made the obviously false allegation that Mr. Sampson was not an original source, but rather filed a motion for sanctions. This motion was granted as well as a dismissal for which there was no request.

## REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The court of appeal awarded the sanction of double costs and attorneys fees. However and according to the advisory committee notes to Rule 38, such sanctions may not be awarded without a separately filed motion or notice, neither of which were present in this case. See Fed. R. App. P. 38, advisory committee's note (1994 Amendment).

Given the compliance by petitioners with the procedure which had previously been approved in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1016, 1018 (10th Cir. 1994) of having the original source resend the information to the United States, which procedure was specifically excluded from the holding in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451-452 and footnote 3 (5th Cir. 1995) and was not prohibited by the court of appeal, petitioners' appeal was not frivolous and should have been fully considered by the

Fifth Circuit Court of Appeal and not dismissed without such consideration.

There is a conflict between the decision of the Fifth Circuit in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) (Koerner I) not only with *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1994), but with cases from other circuits on the issue of original source. See *Hagood v. Sonoma County Water Agency*, C.A.9 (Cal.) 1996, 81 F.3d 1465, 1475-75, certiorari denied 117 S.Ct. 175, 136 L.Ed.2d 116, rehearing denied 117 S.Ct. 501; *U.S. ex rel. Siller v. Becton Dickinson & Co. By and Through Microbiology Systems Div.*, C.A.4 (Md.) 1994, 21 F.3d 1339, 1347, certiorari denied 115 S.Ct. 316, 130 L.Ed.2d 278; *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 (C.A.11 (Fla.) 1994); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657, 304 U.S.App.D.C. 347 (C.A.D.C.1994); *U.S. ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 737-38 (C.A.3 1997).

There is a conflict between the decision of the court of appeal, approving the actions of the district court, and *Steel Company v. Citizens For A Better Environment*, 118 S. Ct. 1003; 1998 U.S. LEXIS 1601; 140 L. Ed. 2d 210 (1998) and cases from other circuits construing subject matter jurisdiction in a similar factual and legal situation. *U.S. ex rel. Fallon*

*v. Accudyne Corp.*, 97 F.3d 937, 940 (C.A.7 (Wis.) 1996). Please also see *Wyke v. Polk County School Bd.*, 129 F.3d 560, 568 (C.A.11 (Fla.) 1997); *Monsky v. Moraghan*, 127 F.3d 243, 2[illegible] (C.A.2 (Conn.) 1997); *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-25 (C.A.D.C. 1997). The averments of the complaint, testimony, and affidavits must be considered.

The imposition by the court of appeal on rehearing of sanctions in an amount approximately one-third the amount of the sanctions granted by the district court (the precise amount requested) suggests that petitioner's appeal on the amount of sanctions was well grounded and not frivolous.

## ARGUMENT AND AUTHORITIES

*Qui tam* relator, Michael Sampson, was an original source of false claims made by Crescent City E.M.S., Inc. and of an ongoing bribery scheme between Crescent City E.M.S., Inc. and a state official at the Charity Hospital of Louisiana to obtain ambulance transports for which such false claims were made. However, not only has there been a summary dismissal for lack of subject matter jurisdiction of Sampson's facially valid fraudulent claim complaint but his counsel has been sanctioned for bringing such a complaint and their appeal dismissed as frivolous and further sanctions entered.

## I.
## ENTRY OF SANCTIONS BY THE COURT OF APPEALS WITHOUT COMPLIANCE WITH FRAP RULE 38

The court of appeal made a determination that the appeal was frivolous and thereupon awarded the sanction of double costs and attorneys fees. However and according to the advisory committee notes to Rule 38, such sanctions may not be awarded without a separately filed motion or notice. Here there was no "separately filed motion or notice form the court and reasonable opportunity to respond." See Fed. R. App. P. 38, advisory committee's note (1994 Amendment).

## II.
## CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE TENTH CIRCUIT ON THE INTERPRETATION OF 31 U.S.C. § 3730(e)(4)

In *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995), that court specifically declined to follow the procedure approved by the court of appeal for the 10th Circuit in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1994). This provides a serious conflict on the important issue of whether a mistake in the filing of a *qui tam* complaint that results in a lack of subject matter jurisdiction can be rectified

by a subsequent compliance with the mandated procedure by the original source.

The disturbing consequence of the Fifth Circuit's procedure is that, as here, the original source/whistle blower is punished while the wrongdoer, the party profiting from the false claims, obtains *de facto* immunity from private prosecution.

## III.
## CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND OTHER CIRCUITS ON ORIGINAL SOURCE

As will be discussed in Section IV, Sampson was an original source and the factual conclusion arrived at by the district court does violence to the precedent of this Court concerning the proper procedure in considering a motion to dismiss for lack of subject matter jurisdiction.

Had the United States not declined to intervene, however, the provisions of 31 USC § 3730(d)(1) might have been applicable to Sampson, an original source of material allegedly previously disclosed. That provision for a person with original knowledge already disclosed is, however, absent from 31 U.S.C. § 3730(d)(2), governing private suits in which there was no government intervention.

In *Hagood v. Sonoma County Water Agency*, C.A.9 (Cal.) 1996, 81 F.3d 1465, 1475-75, certiorari denied 117 S.Ct. 175, 136 L.Ed.2d 116, rehearing denied 117 S.Ct. 501, a similar claim of lack of personal knowledge was made by the defendants, granted by the district court, and reversed by the court of appeal.

*See U.S. ex rel. Siller v. Becton Dickinson & Co. By and Through Microbiology Systems Div.*, C.A.4 (Md.) 1994, 21 F.3d 1339, 1347, certiorari denied 115 S.Ct. 316, 130 L.Ed.2d 278 (original source analysis in situation of previously disclosed information over objection that suit "echoed" the publicly disclosed pleadings.)

In *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 (C.A.11 (Fla.) 1994), the court concluded that the relator was an original source because "The record shows Cooper acquired his knowledge of BCBSF's alleged wrongdoing through three years of his own claims processing, research, and correspondence with members of Congress and HCFA." "[H]is knowledge was direct. And it was obtained independently of the allegations disclosed at the hearing." The district court was found to have erred in finding that Cooper was not an original source, even though he filed suit after the public disclosure. The district court herein attempted to distinguish *Cooper* by claiming that Cooper had supplied the information to the United States prior to filing

suit, whereas he found, despite letters and testimony to the contrary, that Sampson had not furnished the information to the United States until 1996. There is no statutory basis for this conclusion.

In *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657, 304 U.S.App.D.C. 347 (C.A.D.C.1994), the issue was whether the relator had "direct and independent" knowledge of the information that had been disclosed in an earlier proceeding. In language directly applicable to the contentions of the defendants in the present case, the court concluded:

> But the courthouse doors do not swing shut merely because innocuous information necessary though not sufficient to plaintiff's suit has already been made public. We vacate the district court's dismissal and remand with instructions to proceed with the suit.

The district court attempted to place an additional requirement on its jurisdiction, barring Sampson because Michael Boatright made other disclosures in 1990, three years before Sampson began his employment with Crescent City. The statute requires solely and only disclosure to the United States prior to filing the complaint. The district court could require no more. Its decision suffered from a fundamental error

of law that tainted all of its subsequent conclusions and those of the court of appeal.

## IV.
## FAILURE TO ADHERE TO THE WELL-ESTABLISHED PRECEDENT OF THIS COURT IN CONSIDERING A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

In Sampson's affidavit and original documentary material, submitted to the government and previously referenced as well in his testimony, it is obvious that he had direct and independent knowledge, which he communicated to the United States, and so is an original source of these allegations, allegations that have not previously been disclosed or litigated. There is no authority for dismissing a complaint of an original source because information of other and earlier wrongdoing had previously been disclosed.

Once Sampson had filed a complaint stating that he was the original source for jurisdictional purposes, had filed an affidavit to that effect, and had so testified at the evidentiary hearing, his claim of jurisdiction as an original source was not frivolous and could not be dismissed for lack of subject matter jurisdic-

tion at the threshold stage of the proceeding.[8] *Steel Company v. Citizens For A Better Environment*, 118 S. Ct. 1003; 1998 U.S. LEXIS 1601; 140 L. Ed. 2d 210 (1998) at pages 11-12.

For an example of such a holding in the context of "original source," please see *U.S. ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940 (C.A.7 (Wis.) 1996). Please also see *Wyke v. Polk County School Bd.*, 129 F.3d 560, 568 (C.A.11 (Fla.) 1997); *Monsky v. Moraghan*, 127 F.3d 243, 245 (C.A.2 (Conn.) 1997); *E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623-25 (C.A.D.C. 1997); *Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 590, n. 6 (C.A.5 (Tex.) 1992).

## CONCLUSION

Michael Sampson, formerly a Medic One employee, provided a sworn affidavit and sworn testimony that he was personally involved in the receipt by a Charity Hospital employee of bribes in order to refer illegal transports of ineligible patients to Medic One. The false claims resulting from this scheme

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[8] The discussion supposedly had by Sampson with Michael Boatright, president of Priority, took place after Sampson had ceased his employment with Medic One and after he had gained his knowledge of the false claims made by Medic One in connection with the Charity transports.

were actually filed with the United States for reimbursement in 1993 and 1994, many years after the initial lawsuit against Medic One was filed in 1990 by Priority E.M.S., Inc. The decision of the district court has the practical effect of immunizing later false claims and different schemes of the makers of false claims.

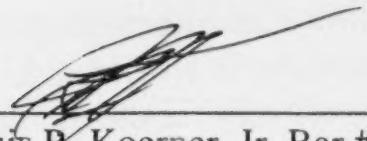
Moreover, dismissal, including sanctions, will constitute a powerful disincentive to prevent whistleblowers and their potential attorneys from acting as private attorney generals. It should also be recalled that there can be no recovery for the *qui tam* relator in these cases except out of recovery by the United States. Here the whistleblower is penalized and discouraged, while a previously admitted wrongdoer attempts to justify immunity from prosecution.

If Sampson's claim that he was an original source of the information as to the false claims act violations committed by Medic One is not frivolous, then Koerner's filing of a complaint containing those allegations cannot be frivolous. Under any circumstance, Koerner's actions in this regard are protected by his reliance on the procedure approved by the court in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015, 1016, 1018 (10th Cir. 1994).

Koerner's assertion of Sampson as an original source after Sampson had submitted the required in-

formation to the United States Department of Justice and in relation on the *Koch Industries* case cannot be frivolous as it is based on valid substantive law in that circuit and, as worst, a good faith argument that the court of appeal adopt that view of a previously undecided legal issue.

LAW OFFICES OF LOUIS R. KOERNER, JR.

By: 

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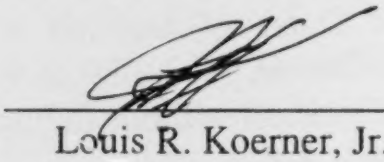
## CERTIFICATE

Undersigned counsel of record certifies that a copy of the foregoing application for writ of certiorari has been sent to the following counsel on this 22nd day of December, 1998 by first class mail, properly addressed, to

William D. Aaron, Jr. and Nancy Eleanor Graham of Phelps Dunbar, LLP, Texaco Center, 400 Poydras

Street, 30th Floor, New Orleans, LA 70130, attorneys for Medic One Ambulance Services, Inc. and American Medical Response, Inc.

Julian R. Murray, Jr., Cherhardy, Sherman, Ellis, Breslin & Murray, Suite 1100, One Galleria Blvd., Metairie, LA 70001attorneys for Crescent City Emergency Medical Service, Inc., d/b/a Medic One



Louis R. Koerner, Jr.

## APPENDIX

## CONTENTS TO APPENDIX

1. *United States of America, ex rel Michael Sampson* (Fifth Circuit, 97-31039 & 97-31309, September 18, 1998) (Decision without Published Opinion) A-1-4.

2. *United States of America, ex rel Michael Sampson* (Fifth Circuit, 97-31039 & 97-31309, October 23, 1998) (Decision without Published Opinion), Rehearing granted. A-4-6.

3. *United States of America, ex rel Michael Sampson* C.A. No. 96-3505-A (United States District Court, Eastern District of Louisiana, 1997 U.S. Dist. LEXIS 14147, September 12, 1997 Opinion: Ruling On Motions For Dismissal/Sanctions). A-7-32.

4. *United States of America, ex rel Michael Sampson* C.A. No. 96-3505-A (United States District Court, Eastern District of Louisiana, 1997 U.S. Dist. LEXIS 18400. November 12, 1997. Opinion: Ruling on Applications For Attorneys' Fees and Costs Imposed As Rule 11 Sanctions) A-33-44.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-31039 & 97-31309

Summary Calendar

UNITED STATES OF AMERICA,
ex relator, Michael Sampson, Sr.,

Plaintiff-Appellant, and

LOUIS R. KOERNER, JR., Movant-Appellant

versus

CRESCENT CITY EMERGENCY MEDICAL SERVICE, INC. doing business as MEDIC ONE; MEDIC ONE AMBULANCE SERVICES, INC.; AMERICAN MEDICAL RESPONSE, INC.; JERRY VARANAY; SUE BIROU; BONNIE EDWARDS,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
USDC No. 96-CV-3505-A

September 18, 1998

Before HIGGINBOTHAM, JONES, AND DENNIS,
Circuit Judges.

PER CURIAM:*

This is round three in attorney Louis R. Koerner, Jr.'s crusade to win a qui tam action arising out of the same set of facts. Koerner lost the first two rounds. See Federal Recovery Services, Inc. v. United States [Koerner I] 72 F. 3d 447 (5th Cir. 1995); United States v. Crescent City E.M.S., No. 96-31126, slip op. at 1-2 (5th Cir. Aug. 19, 1997) (unpublished opinion). The complaint in this round is virtually identical to that dismissed in rounds one and two. The district court accordingly dismissed the round three complaint and imposed sanctions. See United States v. Crescent City E.M.S., No. 96-CV-3505-A (E.D. La. Sept. 12, 1997). The district court's reasoning is sound. We therefore AFFIRM the district court's dismissal of Sampson's and Koerner's claims as well as the court's award of sanctions.

This appeal is similarly frivolous and it is therefore DISMISSED. See 5th Circuit R. 42.2. At the end of the previous round, we cautioned Koerner that "any future frivolous appeals filed by him or on his behalf will invite the imposition of sanctions." Koerner II, slip op. at 2. We meant what we said. We now impose

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

sanctions of double costs and attorney's fees incurred in defending this appeal on Koerner. See Coghlan v. Starkey, 852 F.2d 806, 812-13 (5th Cir. 1988).

DISMISSED and REMANDED FOR DETERMINATION OF COSTS AND ATTORNEYS' FEES.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-31039 & 97-31309
Summary Calendar

UNITED STATES OF AMERICA, ex relator, Michael Sampson, Sr.,

Plaintiff-Appellant, and

LOUIS R. KOERNER, JR.,

Movant-Appellant

versus

CRESCENT CITY EMERGENCY MEDICAL SERVICE, INC. doing business as MEDIC ONE; MEDIC ONE AMBULANCE SERVICES, INC.; AMERICAN MEDICAL RESPONSE, INC.; JERRY VARANAY; SUE BIROU; BONNIE EDWARDS,

Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

**ON PETITION FOR REHEARING**

Before HIGGINBOTHAM, JONES and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is granted and fees of $7,224.61 are awarded.

ENTERED FOR THE COURT: NOV 18 1998

United States Circuit Judge

/S/ Patrick Higginbotham
United States Circuit Judge

UNITED STATES OF AMERICA, ex. rel. MICHAEL SAMPSON, SR. VERSUS CRESCENT CITY E.M.S., INC., d/b/a MEDIC ONE, MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY, SUE BIROU, AND BONNIE EDWARDS
CIVIL ACTION NO. 96-3505 SECTION "A"
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
1997 U.S. Dist. LEXIS 14147
September 12, 1997, Filed; September 15, 1997, Entered

DISPOSITION: [*1] Defendants' motions for sanctions GRANTED. Case DISMISSED for LACK OF SUBJECT MATTER JURISDICTION.

COUNSEL: For MICHAEL UNITED STATES OF AMERICA, EX REL. MICHAEL SAMPSON, SR., SR, plaintiff: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, New Orleans, LA.

For CRESCENT CITY E.M.S., INC. dba Medic One, defendant: Richard C. Stanley, Rachel Wendt Wisdom, Stone, Pigman, Walther, Wittmann & Hutchinson, LLP, New Orleans, LA.

For CRESCENT CITY E.M.S., INC. dba Medic One, defendant: Julian R. Murray, Jr., Chehardy, Sherman, Ellis, Breslin & Murray, Metairie, LA.

For MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY, SUE BIROU, defendants: William David Aaron, Jr., Nancy Eleanor Graham, Phelps, Dunbar, LLP, New Orleans, LA.

For UNITED STATES OF AMERICA, movant: Margaret Montgomery Groome, U. S. Attorney's Office, New Orleans, LA.

JUDGES: Charles Schwartz, Jr., UNITED STATES DISTRICT JUDGE.

OPINION: RULING ON MOTIONS FOR DISMISSAL/SANCTIONS

Before the Court are two motions for sanctions against Louis R. Koerner, Jr. ("Koerner"), counsel for relator Michael Sampson in the captioned qui tam proceeding. Sampson's [*2] Complaint is the third in a series of three False Claims Act suits filed by Koerner involving alleged fraudulent medicare claims for reimbursement for ambulance transport of medically ineligible patients. All of the defendants, Crescent City E.M.S., Inc ("Crescent City") and the AMR defendants, including Medic One, American Medical Response, Inc., Jerry Varanay and Sue Birou, suggest that Koerner's conduct in signing, filing and advocating this third qui tam constitute flagrant violations of FRCP Rule 11. Movers characterize Sampson's qui

tam Complaint as yet another "copy cat" suit which should be summarily dismissed.

Essentially, movers seek sanctions sufficient to curb Koerner's propensity for replicative filings under the False Claims and dismissal of this third qui tam suit as the law of the prior related qui tam cases filed by Koerner dictate. Movers note that the "so called Charity Bribery Scheme referred to in Sampson's suit is the same Charity Bribery Scheme alleged by Koerner in Civil Action 95-0979"A" [Koerner II] and such is a mere continuation of the alleged plot to illegally bill Medicare for improper ambulance transports of dialysis patients and other [*3] patients described by Boatright and Federal Recovery Services in Civil Action 91-4150"A" [Koerner I]."[1] In short, movers argue convincingly that Sampson's Complaint (Koerner III), which is the third such complaint filed with this Court by Koerner, is "based upon" allegations publicly disclosed many years before Sampson began working for Crescent City EMS in 1993, and hence he is not the original source of the information upon which the suit is based and the Court lacks subject matter jurisdiction.

Koerner filed formal opposition arguing that FRCP Rule 11 is not applicable, and the only appropriate remedy regarding the conduct complained of in

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[1] Movers' Joint Reply Brief, at pp. 4-5

defendants' motions for sanctions is set forth in *31 U.S.C. § 3730*(d)(4.)[2] In this vein, Koerner asserts that no motion to dismiss has been filed, and thus, any request for an award of attorneys' fees and expenses for filing a frivolous False Claims Act suit is premature.

[*4]

At the outset the Court notes that it has discerned no authority which holds that pleadings signed, filed and advocated in False Claims Act cases are relieved from the dictates of FRCP Rule 11. Koerner has identified no such authority. Additionally, Koerner's suggestion that there is no motion to dismiss before this Court is ludicrous. Although defendants' motions are styled "Motion for Sanctions," the quite obvious thrust of the motions and memoranda in support is that dismissal of the instant qui tam Complaint is warranted on the very same bases that this Court dismissed two prior related qui tam proceedings, the second being almost identical to the this third qui tam Complaint. The very basis of defendants' request for imposition of sanctions is that the clear rulings and the law of prior related qui tam cases issued by this Court and by the Fifth Circuit command the conclu-

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[2] Section 3730(d)(4) of the False Claims Act provides that "the court may award the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous ...."

sion that subject matter jurisdiction also does not exist in this third qui tam Complaint. Should this Court agree (and it does for the reasons explained hereinbelow), not only is dismissal of this third qui tam Complaint required, but also, FRCP Rule 11 sanctions against Koerner are [*5] warranted.

It is not disputed that Koerner participated not only as counsel of record but also as a party in the prior related qui tam cases to which the parties and this Court refers. He is no stranger to the law or the facts of the prior related qui tam proceedings. Defense counsel highlights that other than the shortened timeframe of the allegations of wrongdoing and the substitution of yet another relator in this third qui tam suit, it is identical to the second (i.e., CA 95-0979"A") which was filed by Koerner and dismissed by this Court for lack of subject matter jurisdiction.

The fact that the defendants' motions in this case were styled "Motion for Sanctions" instead of "Motion for Sanctions and Dismissal" is of no moment. Rule 1 of the Federal Rules of Civil Procedure provides that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." The tortuous trail swathed by Koerner in serially relating through himself and others allegations of false claims in triplicate has resulted in anything but a just, speedy, and inexpensive determination of the action.

Defendants' motions and supporting memoranda [*6] are more than sufficient to put the relator and his counsel on notice that the thrust of their motions is twofold, to wit: (1) dismissal of Sampson's case is warranted in light of the law of the two prior related qui tam proceedings which eviscerates any "good faith" belief that Sampson's case would not summarily suffer the same fate (i.e., dismissal for lack of subject matter jurisdiction; and concomitantly, (2) FRCP Rule 11 sanctions are warranted.

Only a myopic and disingenuous reading of the pleadings, defendants' motions and the law of prior related cases concerning these very same allegations of wrongdoing could induce an individual to persist in the prosecution of this "copycat" qui tam Complaint. This Court finds Koerner's persistence in opposing the instant Motion for Sanctions shocking. Rather than agreeing to dismiss Sampson's Complaint in light of this Court's and the Fifth Circuit's controlling and dispositive rulings in the prior related qui tam proceedings in which Koerner himself figured prominently as a counsel and a party, Koerner insists that the show must go on.

Koerner's opposition brief lends absolutely no assistance to the Court. [*7] Therein, Koerner attempts to obfuscate the issues and presents utterly preposterous arguments.[3] It is quite apparent that Koerner has

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[3] See, Discussion at pp. 14-17, infra.

failed to retain or review the lessons taught[4] by Federal Recovery Services case (Civil Action No. 91-4150"A" and Koerner ex rel v. Crescent City EMS, et al (Civil Action No. 95-0979"A"), Koerner I and Koerner II, respectively. Koerner's opposition memorandum telegraphs only a consummate study how to avoid the real issue -- his sanctionable conduct in espousing precisely the same position previously rejected by this Court and the Fifth Circuit in connection with substantially similar if not identical allegations filed pursuant to the False Claims Act. The history of and rulings emanating from the prior related qui tam proceedings are discussed in some detail hereinbelow.[5]

In light of the striking similarities between the first, [*8] second and this third qui tam suits, all filed by Koerner, this Court is of the opinion that an evidentiary hearing is not warranted and the matter is deemed submitted for decision on the documents of record to date. This Court previously conducted an evidentiary hearing in connection with the defendants' motions to dismiss the almost identical Civil Action 95-0979 (Koerner II). But for the shortened timeframe and the substitution of Sampson as relator (which substitution this Court did not allow in Koerner II), Sampson's Complaint is identical to the second suit

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[4] See, Discussion at pp. 8-12, infra.

[5] See, Discussion as pp. 6-12, infra.

which was dismissed for lack of subject matter jurisdiction.

In addition to the foregoing, for the following reasons defendants motions are GRANTED and thus, both dismissal of the captioned matter and the imposition of FRCP Rule 11 sanctions against Koerner are warranted under the facts and the unmistakably applicable law.

Juxtaposition of the instant Complaint and the pleadings filed also by Koerner in prior related qui tam proceedings, in concert with a review of the rulings which the prior related proceedings evoked, lead only to the conclusion that FRCP Rule 11 sanctions are warranted in this case, including [*9] dismissal of the instant complaint. Koerner's bad faith in signing and serving the frivolous Complaint in the captioned case is patent and inexcusable[6] in light of the law of prior related cases which presented this Court with precisely the same issues.

So that there is no mistake about the applicable law to which this Court refers, it repairs to the year 1990, when Koerner filed two state court suits on be-

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[6] This Court has not been apprised of any mental or physical affliction affecting Koerner which could either account for and or excuse turning "a blind eye" to the applicable law penned in cases in which Koerner himself participated both as a party/relator and as counsel of record.

half of Priority E.M.S., Inc.[7] against Crescent City and others in Louisiana state court, both alleging that Crescent City submitted fraudulent claims for reimbursement for ambulance services provided to individuals who were not medically eligible for those services. See, Priority E.M.S., Inc. v. Crescent City E.M.S. d/b/a [*10] Medic One, Inc., No. 90-19542 (La.Civ.Dist.Ct.), remedial writ denied, *607 So. 2d 559 (La. 1992)*, cert. denied, *646 So. 2d 380 (La. 1994)*; Priority E.M.S., Inc. v. Crescent City E.M.S., Inc. d/b/a Medic One, Inc. and Medic One, No. 64-668(Jud.Dist.Ct.), remedial writ denied, *600 So. 2d 660 (La. 1992)*. These were "public disclosures" and the Fifth Circuit so held.[8]

[*11]

Thereafter, in 1991 and on behalf of Federal Recovery Services, Inc. ("FRS"), Koerner filed a False

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[7] Michael Boatright, owner of the competing ambulance service Priority E.M.S., Inc., discovered information which formed the basis of allegations of fraudulent claims for ambulance transport services against Crescent City and others, alerted the United States and the news media of his allegations, and filed two state court suits alleging unfair trade practices as well as several of the very same allegations set forth in the 1991 qui tam proceeding filed on behalf of Federal Recovery Services (Koerner I) with this Court [i.e., Civil Action No. 91-4150"A"].

[8] *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995) [Koerner I].

Claims Act suit (qui tam proceeding) in this Court against Crescent City, Varanay, and others based on substantially the same allegations made on behalf of Boatright by Koerner in the prior state court litigation. FRS was an entity incorporated by Koerner and others to serve as the relator in the first qui tam suit filed by Koerner with this Court under civil action number 91-4150"A" (Koerner I). In Koerner I, this Court determined that FRS, not an original source, had no standing to prosecute the qui tam suit which was based on previously and publicly disclosed allegations.

In connection with this third qui tam Complaint, Koerner contends that because Sampson allegedly witnessed specific acts of bribery while employed by Crescent City EMS, Inc. d/b/a Medic One that Sampson is an original source of the information in the subject third qui tam Complaint.[9] The subject Complaint (Koerner III) refers to a Charity Bribery Scheme, which is the same Charity Bribery Scheme alleged by Koerner in Civil Action No. 95-0979 Koerner II). As such, it is a continuation [*12] of the al-

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[9] It is important to note, as do movers in their original submissions and their joint reply brief, that all of the acts of bribery allegedly witnessed by Sampson occurred before the acquisition of Crescent City's ambulance related assets by the AMR defendants in September of 1994 and as such, the Complaint at issue fails to state a cause of action against the AMR defendants.

leged plot to fraudulently charge Medicare for improper ambulance transports of dialysis and other patients described by Michael Boatright ("Boatright") and Federal Recovery Services ("FRS") in Civil Action No. 91-4150 (Koerner I).[10]

[*13]

This Court's August 30th, 1993 Order and Reasons, issued in Koerner I and which consists of seventeen pages of findings of fact and conclusions of law, amply discusses and details the reasons for dismissing FRS's claims and denying its motion to amend to add Boatright as relator. This Court's order denying FRS' Motion to Amend was premised on the clear language of *31 U.S.C. §§ 3730*(E)(4)(A),[11] 3730(e)[12] and

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[10] Defense counsel notes, and this Court recalls, that Sampson testified in the evidentiary hearing held in connection with Civil Action No. 95-0979, a qui tam action pursuant to the False Claims Act which is essentially identical to Sampson's. Therein, Sampson admitted that prior to retaining Koerner, he had discussions with Boatright about his other qui tam (Koerner I) and other suits alleging illegal ambulance transports charged to Medicare. The period of June of 1993 to August of 1994 which is covered by Sampson's Complaint (Koerner III) is overlapped by the time period covered by the FRS Complaint (Koerner I), which was the period from January of 1989 to September of 1994.

[11] *31 U.S.C. § 3730*(e)(4)(A) limits the subject matter jurisdiction of courts adjudicating qui tam actions under the False Claims Act and provides that "no court shall have jurisdiction over an action under this section based upon the public disclo-

3740(b)(5), which prohibits intervention in a qui tam action by any person other than the Government. The Fifth Circuit also rejected Koerner's argument that Boatright could be substituted for FRS as relator and explained:

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sure of allegations or transactions in a criminal, civil or administrative hearing, ..., unless the action is brought by the Attorney General or the person bringing the action is an original source." Id.

[12] An "original source" is immune from the jurisdictional bar of *31 U.S.C. § 3730*(e). The False Claims Act defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *31 U.S.C. § 3730*(e)(4)(B).

In the FRS suit, the Fifth Circuit rejected Koerner's argument to the effect that FRS that even if it was not the original source of the information collected prior to its incorporation, it is the original source of that information obtained after its incorporation which significantly enhanced the value of the litigation to the United States. It held:

> FRS was incorporated with the express purpose of pursuing qui tam litigation based on the information that others, either Priority E.M.S. or Boatright, had already obtained. Any information collected afterward was the product or outgrowth of the information that others had obtained. *72 F.3d at 453.*

In *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995), the Fifth Circuit affirmed this Court's rulings in Koerner I, and held that: (1) the filings in the Louisiana state courts by Priority E.M.S. were "public disclosures" within the meaning of the statute, and that FRS's qui tam action (Koerner I) was "based on" these public disclosures. *Id.* at 450-51. The Fifth Circuit rejected Koerner's argument on behalf of FRS that its investigation unearthed additional instances of fraudulent conduct by Crescent City that were not part of the earlier state court litigation and explained: "'An FCA qui tam action even partly based upon publicly disclosed allegations or transactions is nonetheless 'based upon' such allegations or transactions.'" *Id.* at 451. The FRS court concluded that Federal Recovery Services could not avoid the jurisdictional bar simply by adding other claims that are substantively identical to those previously disclosed. *Id.*

> We do not take such a sanguine view of the federal courts' limited subject matter jurisdiction. That FRS sought to include Boatright as relator prior to the district court dismissing it from this suit is of no moment.... Regardless of when the district court actually determines it lacks subject matter jurisdiction over the original plaintiff, 'Rule 15 ... do[es] not allow a party to amend to create jurisdiction where none actually existed.' 72 F.3d at 453.

This Court's rulings in Koerner I (the FRS suit) were affirmed by the Fifth [*14] Circuit on appeal. See, *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450 and 452-53 (5th Cir. 1995).

[*15]

In 1995, Koerner [*16] filed a second False Claims Act suit under civil action number 95-0979"A" (Koerner II) naming himself as relator and alleging that Crescent City, Varanay, Birou, AMR, Medic One and Bonnie Edwards submitted fraudulent medicare claims for reimbursement for the transport of patients medically ineligible for ambulance transport under medicare regulations.[13] Therein, Koerner alleged that his claims were based on information derived from his own investigation and from Michael Sampson, a former Crescent City employee.[14] Crescent City and the AMR defendants moved dismiss Koerner's second qui tam complaint on the basis of

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[13] Here also, the Court notes that the period of from June of 1993 to August of 1994 covered by Sampson's Complaint (Koerner No. III) overlaps the period covered by Koerner's qui tam suit Civil Action No. 95-0979 (Koerner No. II).

[14] In September of 1994, a subsidiary of Medic One, AMR, bought the assets of Crescent City (which formerly operated under the name of Medic One) and began operating an ambulance service in New Orleans under the name of AMR. AMR hired most of Crescent City's former employees, including Varanay and Birou, but did not hire Sampson who had been employed by Crescent City from June of 1993 up to August of 1994.

Koerner's lack of standing/lack of subject matter jurisdiction -- that is, (1) the allegations of his second complaint (Koerner II) were previously and publicly disclosed; (2) Koerner was admittedly not the original source; and (3) the allegations of wrongdoing were previously publicly disclosed and mere outgrowth of the prior litigation. As was done in Federal Recovery Services (Koerner I), Koerner attempted to cure the jurisdictional defect in Koerner II by moving to substitute Sampson as relator instead of himself.

[*17]

Regarding Koerner II, in its September 6, 1996 order this Court granted defendants' motion to dismiss and denied the Koerner's motion to substitute Sampson. In so doing, this Court relied on the law of prior related cases including the Fifth Circuit decision in *Federal Recovery Services*, 72 F.3d at 453.

Soon after this Court denied Koerner's Motion for Reconsideration of its order dismissing the second qui tam suit, Koerner filed the subject Complaint -- his third qui tam proceeding filed with this Court, however this time naming Sampson as relator.[15] With the exception of a more abbreviated time frame and the substitution of Sampson as relator, the pleadings in the second (Koerner's) [*18] suit and third

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[15] Koerner did not serve the defendants with the third qui tam suit until May of 1997.

(Sampson's) qui tam suit are identical. Most recently the Fifth Circuit has affirmed this court's judgment dismissing Koerner II for lack of subject matter jurisdiction.

There is no question but that signing and serving the Complaint in the instant (Koerner's third) qui tam suit based upon the allegations of fraud involving transport of medicare patients which were based upon allegations made in the first and second qui tam suits filed by Koerner constitute a flagrant violations of FRCP Rule 11. In the context of both civil action numbers 91-4150"A" (Koerner I) and 95-0979"A" (Koerner II), Koerner was instructed at length by this Court and the Fifth Circuit that the jurisdictional defect extant in both of those proceedings could not be cured by intervention, substitution or amendment.[16]

[*19]

The instant qui tam proceeding, Koerner III, is infected with the same fatal jurisdictional defects which resulted in the dismissal of Koerner I and II. Both judgments of dismissal in Koerner I and II were affirmed on appeal. The only reasonable expectation is that the same fate would befall Koerner III.

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[16] See, *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450-53 (5th Cir. 1995); *United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 450 (E.D. La. 1996).

Sampson's qui tam Complaint is identical in pertinent part to Koerner II.

Neither intervention by nor the substitution of another plaintiff in the place of the originally named qui tam plaintiff/relator is permissible. Similarly, filing yet another related proceeding with precisely the same allegations based information that was previously publicly disclosed, will not cure the jurisdictional defect.[17] Such a result obtains whether the "new

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[17] A mathematical analogue is most apt in demonstrating the what's wrong with this picture. The variables include substitution of another party/plaintiff, intervention of another party/plaintiff, and subsequent related litigation instituted by another plaintiff based in part or derived from the prior publicly disclosed allegations. These three variables are assigned the factors A (FRS or Boatright), B (Koerner), C (Sampson), respectively. The factors A, B, and C are equivalent as they accomplish the same end -- that is, the insertion of another plaintiff/relator. The factor Z is assigned to the constant -- the constant in this case is qui tam actions which allege wrongdoing with some minor variations against the same defendants and within overlapping time frames. Given that A, B, and C, are the substantial equivalents, if Z + A ='s no jurisdiction (Koerner I), then both Z + B (Koerner II) and Z + C (Koerner III) also amount to no subject matter jurisdiction. All three of these scenarios were played out in the first and second qui tam suits which Koerner filed. Koerner was told in no uncertain terms by this Court and the Fifth Circuit that "Z" was not viable in conjunction with either variable "A", "B" or "C". This third qui tam complaint is infected with the very same jurisdictional flaws which resulted in the early termination of both

relator" adds a few or subtracts a few similar claims, such action does not make him an "original source."

[*20]

The Fifth Circuit instructed Koerner in its Federal Recovery Services decision stating, inter alia: "FRS cannot avoid the jurisdictional bar simply by adding other claims that are substantively identical to those previously disclosed in the state court litigation." *72 F.3d at 451.* The Fifth Circuit concluded its decision stating that neither FRS nor Boatright were proper parties to the qui tam litigation. Id.

In its ruling dismissing Koerner's qui tam suit (Koerner II), this Court noted that Sampson testified at the evidentiary hearing held in connection with the motion to dismiss and acknowledged that before contacting Koerner regarding the alleged fraudulent medicare conspiracy involving the illegal ambulance transport of patients, he contacted Boatright and discussed the allegations in the FRS suit (Koerner I). *U.S. ex rel Koerner v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 450 n.12. (E.D. La. 1996).

In Koerner II, this Court concluded that Koerner merely reiterated the substance of the allegations

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prior related qui tam suits in which Koerner participated as a party and as counsel of record.

made in Federal Recovery Services and simply added a few specific allegations regarding false claims in connection with the transport [*21] of certain Charity Hospital patients. Defense counsel aptly describes this matter, Sampson's suit (Koerner III), as "copy cat" litigation. It thus manifests the same fatal jurisdictional flaw that beset FRS, Boatright, and Koerner in Koerner I, as well as Koerner again along with Sampson in Koerner II.[18]

[*22]

FRCP Rule 11 unquestionably applies to the conduct of Koerner at issue. As previously alluded to,

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[18] Most recently on August 19, 1997 and via per curiam, the Fifth Circuit dismissed Koerner's appeal of this Court's judgment dismissing his second qui tam suit for lack of subject matter jurisdiction as frivolous and issued a sanctions warning. Presumably, Koerner also received a copy of the Fifth Circuit's dismissal order including the sanctions warning weeks before the hearing date noticed in connection with the instant motions for sanctions. In the wake of Koerner II, instead of voluntarily dismissing Koerner III with prejudice, Koerner persists with the subject complaint. It is based upon allegations previously publicly disclosed on several prior occasions. Koerner continues to advocate the erroneous position that the substitution of Sampson will cure the jurisdictional defects which beset Koerner II. In clear contravention of the law of the case, Koerner persists in bringing repetitive qui tam complaints with minor variations and swapping plaintiffs. Koerner III presents another whistleblower, also not an "original source," tooting the same horn.

Koerner's arguments in opposition to the instant motions are specious. In footnote 4 of his opposition, Koerner twists and misconstrues the basis of this Court's dismissal of Koerner II. Contrary to Koerner's argument, this Court did not dismiss Koerner's second qui tam suit on the basis that Sampson was the "original source." Rather, this Court's dismissal of the second qui tam suit for lack of subject matter jurisdiction was predicated upon the following observations: (1) "Koerner admits that he is not the 'original source' of the information regarding the alleged 'false claims' made by defendants in connection with the transport of Charity Hospital patients;"[19] (2) Koerner could not cure that jurisdictional defect by substituting anyone, including but not limited to Sampson;[20] (3) the subject of the second qui tam suit was most apparently de-

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[19] 946 F.2d at 451. This Court also noted in its September 1996 order that " Koerner relates that he obtained information from Michael Sampson, Sr., a former employee of Medic One ...." 946 F. Supp. at 477.

[20] In its September 1996 order dismissing Koerner's second qui tam suit, this Court observed that:

Koerner [was] attempting the same plaintiff swapping maneuver that he, as counsel for FRS and Boatright, attempted in the earlier Federal Recovery Services qui tam litigation. Here too, Koerner recognizing that he is not the "original source" of the information upon which the allegations of the pending qui tam complaint are based, seeks to substitute Sampson instead of himself as relator .... 946 F. Supp. at 449 n.7.

rived from and based on the earlier publicly disclosed allegations which resulted in FRS suit.[21]

[*23]

In Koerner II, there was no adjudication to the effect that Sampson was the "original source" of the allegations of wrongdoing [*24] in that suit. The quite obvious thrust of this Court's reported opinion dismissing Koerner's second qui tam suit for lack of subject matter jurisdiction was that Koerner was not the "original source," knew he was not the "original source," and yet filed the second qui tam suit naming himself as relator. Additionally and equally as important to this Court's ruling dismissing Koerner II, the allegations of wrongdoing which were the subject of Koerner II were derived in part and/or based upon the earlier information publicly disclosed via the FRS litigation, Koerner I.

Koerner cites *Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 568 (11th Cir. 1994)* for the proposition that a relator who acquires

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[21] In its September 1996 order, this Court held: "Essentially, Koerner repeats the substance of the allegations of the prior qui tam suit (i.e., that Crescent City and others defrauded the government by charging Medicare for non-medically necessary ambulance transportation) and simply adds a few specific allegations regarding false claims in connection with the transport of certain Charity Hospital patients ...." *Id.* at 450-51.

knowledge of wrongdoing through his own efforts, research, correspondence and independently of the publicly disclosed information is an "original source." However, the Cooper court noted that relator had requested an official investigation into defendant's wrongdoing before any hearing making public disclosure of any of the allegations.

Koerner's reliance on the *Cooper* case is misplaced. In the case at bar, Sampson did not apprise Government [*25] officials of any wrongdoing until September of 1996,[22] that is six years after public disclosure via Boatright's state court litigation, five years after public disclosure via Koerner I, and some months after public disclosure of precisely the same allegations via Koerner II.

As previously mentioned, Koerner's second qui tam and this, his third naming Sampson as relator, are almost identical. With minor variations, Sampson's complaint alleges precisely the same conspiracy publicly disclosed via Koerner I and II.

To make it perfectly clear, Koerner's complaint (i.e., his second qui tam suit) was dismissed for several reasons, including that the allegations were based in part upon and/or derived from his investigation in connection with and participation in the FRS case and

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[22] See, Koerner's Opposition to Motions for Sanctions, at p. 2.

Boatright's earlier state court suits. This third qui tam action also filed by Koerner, naming Sampson as relator, seeks to accomplish indirectly what this Court previously held could not be accomplished directly. By signing and serving the instant Complaint which is based on the same allegations of fraud which formed the basis of his two prior qui tam suits, Koerner has violated [*26] FRCP Rule 11.

This Court cannot countenance the sanctionable conduct complained of here. The Court finds unavailing Koerner's crimped and skewed view of the controlling cases in which he participated. Both Koerner I and II clearly command dismissal of the captioned matter for lack of subject matter jurisdiction.

As to the precise nature of sanctions, FRCP Rule 11(c)(2) provides:

> A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of an non-monetary nature, an order to pay a penalty into Court or, if imposed on motion and warranted for effective deterrents, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other ex-

penses incurred as a direct result of the violation.

[*27]

An award of reasonable attorneys' fees and other expenses incurred in defending against the subject frivolous complaint is unquestionably warranted. However, neither attorneys' fees imposed by this Court as sanctions in Koerner II nor the sanctions warning issued by the Fifth Circuit in Koerner II served to deter Koerner's prosecution of the third such suit. Thus, it is clear that a monetary penalty, by itself, will not serve to deter Koerner from persisting in this course of conduct. Accordingly, in addition to awarding reasonable attorneys' fees and expenses, the circumstances also warrant a directive from this Court which might serve to deter any such future frivolous filings. Koerner shall along with his filing of any future complaint apprise the judges of any district court to which any such case is allotted of this Court's ruling on the motions for sanctions in Koerner II and III. This Court does pause to consider whether such a directive will in fact serve to deter such future conduct when the Fifth Circuit's sanctions warning issued in connection with Koerner II (a pointed directive) most apparently went completely ignored. The Court will certainly consider a further [*28] sanction in the event that Koerner persists in this course of action.

Accordingly and for all of the above and foregoing reasons,

IT IS ORDERED that defendants' motions for sanctions are GRANTED.

IT IS FURTHER ORDERED that the counsel for the defendants' shall file their applications for attorneys' fees and expenses with this Court on or before October 3, 1997.

IT IS FURTHER ORDERED that Louis R. Koerner, Jr. shall have the opportunity to traverse and file any response to defense counsel's attorneys' fees application he may deem appropriate but in no event shall any response be filed later than October 17, 1997.

IT IS FURTHER ORDERED that this case is DISMISSED for LACK OF SUBJECT MATTER JURISDICTION.

The Clerk of Court is directed to enter judgment dismissing the case.

New Orleans, Louisiana, this 12th day of September, 1997.

Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA, ex. rel. MICHAEL SAMPSON, SR. VERSUS CRESCENT CITY E.M.S., INC., d/b/a MEDIC ONE, MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY, SUE BIROU, AND BONNIE EDWARDS

CIVIL ACTION NO. 96-3505 SECTION "A"
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA
1997 U.S. Dist. LEXIS 18400
November 12, 1997, Filed; November 12, 1997, Entered

DISPOSITION: [*1] Phelps Dunbar's and Crescent City E.M.S., Inc.'s applications for attorneys' fees in full amount of $13,168.28 and $6,227.50 GRANTED.

COUNSEL: For UNITED STATES OF AMERICA, EX REL. MICHAEL SAMPSON, SR., plaintiff: Louis Roy Koerner, Jr., Louis R. Koerner, Jr., Attorney at Law, New Orleans, LA.

For CRESCENT CITY E.M.S., INC. dba Medic One, defendant: Rachel Wendt Wisdom, Stone, Pigman, Walther, Wittmann & Hutchinson, LLP, New Orleans, LA.

For CRESCENT CITY E.M.S., INC. dba Medic One. defendant: Julian R. Murray, Jr., Chehardy, Sherman, Ellis, Breslin & Murray, Metairie, LA.

For CRESCENT CITY E.M.S., INC. dba Medic One, defendant: Richard C. Stanley, Stanley & Flanagan, L.L.C., New Orleans, LA.

For MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY, SUE BIROU, defendants: William David Aaron, Jr., Nancy Eleanor Graham, Phelps, Dunbar, LLP, New Orleans, LA.

For UNITED STATES OF AMERICA, movant: Margaret Montgomery Groome, U. S. Attorney's Office, New Orleans, LA.

JUDGES: Charles Schwartz, Jr., UNITED STATES DISTRICT COURT.

OPINION: RULING ON APPLICATIONS FOR ATTORNEYS' FEES AND COSTS IMPOSED AS RULE 11 SANCTIONS[1] [*2]

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[1] This Court previously dismissed the captioned matter pursuant to defendants' motions for FRCP Rule 11 sanctions and ordered defense counsel to submit their applications for attorneys' fees and costs in connection with the third in a series of three qui tam suits filed by Louis R. Koerner, Jr.

Pursuant to this Court's order entered September 15, 1997 counsel for Medic One Ambulance Services and the AMR defendants along with counsel for Crescent City E.M.S. have filed their applications for attorneys' fees and costs incurred in connection with the defense of this third in a series of three qui tam proceedings instituted by Louis R. Koerner, Jr. ("Koerner"). Koerner filed formal opposition arguing that the attorneys' fees totalling $20,000.00 allegedly incurred in connection with defending against this qui tam proceeding are "egregiously excessive." Defendants formally replied. The matter was noticed for hearing on Wednesday, October 29, 1997, but the matter was deemed submitted on the briefs and [*3] the documents of record.

Koerner contests neither the hourly rate charged by defense counsel nor the costs incurred which are minimal. However, Koerner argues that considering the tasks actually performed by defense counsel and that he, himself, only expended only 3.5 hours opposing defendants' FRCP Rule 11 motions (i.e., for dismissal and attorneys' fees as sanctions), the services billed by defense counsel in this case were unreasonable and extravagant.[2] Additionally, Koerner now

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[2] Koerner suggests in his opposition memorandum that the total amount of time he expended amounts to 3.5 hours which at a standard hourly rate of $175.00 results in a fee totalling $612.00. In reply, defense counsel informs the Court and reminds Koerner of his August 14, 1997 representation in writing to the effect that he had $20,000.00 in fees and costs invested

suggests that outcome of this case (i.e., summary dismissal as frivolous) was totally foreseeable and defense counsel's efforts to eradicate this third qui tam suit from this Court's docket should either remain virtually uncompensated or the expense should be born by the defendants in this case. Essentially, Koerner argues that dismissal of this case (Koerner III) was a foregone conclusion and little, if any, of the services billed by defense counsel were warranted or appropriate. Koerner takes the position that a case which is disposed of summarily on motions without oral hearing cannot result in the reasonable attorneys' fees in the realm of $20,000.00.[3] In closing, counsel for rela-

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in this matter. See, Letter dated August 14, 1997, attached to and filed along with Phelps Dunbar's Reply Memorandum in Support of Application for Attorneys' Fees.

[3] The Court here observes that in its own experience attorney's fees and costs exceeding $20,000.00 are not unusual in a relatively concise case disposed of on motions summarily without the necessity of trial, extensive discovery or in-court hearings. This Court has had the occasion in the recent past to consider several applications for attorney's fees and costs in relatively concise summary judgment cases. See e.g., *Globe Glass & Mirror Company v. Commissioner of Insurance for the State of Louisiana*, 1996 U.S. Dist. LEXIS 8128, 1996 WL 325602 (E.D. La. June 12, 1996)(Schwartz, J.)(finding $43,032.88 in reasonable attorneys' fees necessarily incurred on account of the lawsuit resolved on cross-motions for summary judgment); and *Acorn, et al v. Edwin Edwards, et al*, 1994 U.S. Dist. LEXIS 20959, 1994 WL 634983 (E.D. La. 1994), rev'd on other grounds, 81 F.3d 1387 (5th Cir. 1996)(another case not

tor reminds [*4] the Court that he is a solo practitioner and suggests that: (1) a $20,000 fee bill presents a substantial hardship in his case; and (2) sanctions in the form of attorneys' fees totalling $20,000 would adversely impact his ability to continue to devote time to civic duties he undertakes on a volunteer basis.

[*5]

This Court's September 15th, 1997 ruling dismissing this case (Koerner III) as frivolous and granting defendants' motion for sanctions was the product of many hours of the work by this Court and its staff. At the very least, it entailed due consideration of the pleadings, briefs and documents of record filed in this case (Koerner III) and necessarily the records of two prior related qui tam cases filed by Koerner (Koerner I and II), including opinions and rulings issued with respect to same both by this Court and the Fifth Circuit Court of Appeals.[4]

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litigated to verdict holding $41,181.25 in attorney's fees and expenses reasonably incurred and appropriate).

[4] The Court here notes the task entailed several days worth of effort as opposed to several hours -- that is, even with the benefit of the well-written submissions counsel. One cannot ignore the fact that the validity/merit of defendants' motions rested upon well-over five years of prior litigation in the same vein filed either on behalf of or by Koerner, all of which had to be reviewed, rehashed, and assimilated into cogent memoranda justifying the summary disposition of the third such suit favorable to the defendants and attorneys' fees as sanctions.

[*6]

Neither the length of the briefs penned by defense counsel nor the length of the dispositive opinion penned by this Court constitute an appropriate yardstick with which to measure the time and efforts which culminated in those writings. This case itself was wrought from two substantially similar qui tam cases in which Koerner participated as counsel and as relator. Any disposition of the sanctions issue involved wading through the twists and turns of both prior related proceedings which spanned the period of five years. Hearings were conducted in the prior related cases. In its September 15, 1997 opinion this Court referred to the hearing held in connection with the dismissal of Koerner II. The Court is not persuaded by Koerner's arguments to the effect that this was a facile victory for the defendants and that the efforts expended by defense counsel seeking dismissal of Koerner III were unwarranted or excessive.

In support of their applications for attorney's fees and costs, defendants have submitted contemporaneous time records, documents and affidavits reflecting their attorneys' fees and costs charged, all of which sufficiently detail the dates services were rendered, the [*7] time involved, and the nature of the services performed in defense of the captioned lawsuit. In this vein, counsel for Medic One Ambulance Services and the AMR defendants document attorneys' fees and

expenses totalling $13,168.28. Counsel for Crescent City E.M.S. prays for attorneys' fees in the total amount of $6,227.50.

The record leaves no doubt that counsel for the AMR defendants took the laboring oar in this case. Counsel for Crescent City E.M.S., Inc. made an obvious effort not to duplicate the work of co-defendants' counsel by adopting and supplementing briefs filed on behalf of co-defendants. On occasion and where it appeared appropriate defense counsel filed jointly as efficacy dictated in an apparent effort to curtail unnecessary expense in defending against this third qui tam suit.

The Court has reviewed the fee applications submitted on behalf of the defendants line item by line item. Defense counsel submitted very thorough documentation of their time and expenses in this matter. Although it appears that a considerable amount of time was spent in defense of this third frivolous suit, the Court discerns no time unnecessarily or unreasonably spent under the circumstances. [*8] Defense counsel left no stone unturned as a vigorous defense and competent representation would dictate. There is no indication that defense counsel spent an excessive amount of time either reviewing documents, researching, drafting motions and memoranda or performing any other compensable service necessary to slay this "hydra" (then Koerner III) and concomitantly, to mollify their exasperated clients.

There is no basis to conclude that defense counsels' fees were the product of extravagance. All of the services reflected by defense counsels' fee bills were undoubtedly precipitated by the captioned qui tam suit. Duplication and multiplication of efforts was occasioned only by the fact that this was Koerner's third such suit, the defense of which necessarily entailed delving back and thoroughly reviewing Koerner's first and second substantially similar suits and the rulings emanating therefrom.

The determination of reasonable attorneys' fees is a two-step process involving the examination of both the number of hours and the hourly rate requested. Koerner does not dispute that the hourly rate requested is reasonable but rather has taken aim at the number of hours spent by defense counsel. [*9] The parties seeking attorneys' fees bear the burden of demonstrating that their requests are reasonable.

As previously mentioned, the defendants have done so in this case by submitting detailed contemporaneous time records and affidavits and memoranda supporting their assertions as to the number of hours expended and the rates claimed. Weighing the submissions in the light of this Court's own experience with this case and its genesis, it can say with complete and utter candor that the hours expended by defense counsel rationally reflect the services rendered in defense of Koerner III (i.e., Koerner I and II revisited

plus). Defendants have more than adequately demonstrated that diffusing Koerner III proved to be both a time-consuming and an exasperating experience for all concerned and sufficiently justified their concerted and substantial efforts to end it.

Within the context of Koerner II, this Court imposed monetary sanctions against Koerner in form of attorneys' fees, which sanction was apparently insufficient to deter the continued improper conduct of counsel. There is no question but that every hour billed by defense counsel in connection with this third qui tam suit and the [*10] expenses incurred are the direct result of Koerner's FRCP Rule 11 violations in this case which are more than adequately detailed in this Court's September 15, 1997 opinion which this Court incorporates herein by reference.

Considering the history of this case, the Court is convinced that nothing less than full compensation for all expenses incurred in connection with the defense of this suit (Koerner III) will effectively deter future improper conduct. Attorneys' fees and costs in a lesser amount (i.e., $8,418.73) imposed against Koerner as sanctions by this Court in Koerner II has proved unavailing.

Consideration of the Johnson factors[5] does not persuade the Court to adjust the lodestar one iota. As to the first factor, considering this case and its etiology the amount of time and effort involved was not unusual or excessive and is adequately reflected in the hourly rates charged and the contemporaneous time records submitted for this Court's review.

[*11]

Similarly as to the second factor, the Court finds that the novelty and/or difficulty of issues does not dictate an adjustment. The Court also does not find that the degree of skill required to perform the legal services in this case necessitates any adjustment. There is no evidence that the amount of time expended by the attorneys in this case precluded their employment to any extent. The Court finds the hourly

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[5] The standard in this circuit governing the computation of attorney's fees is set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and includes: (1) the time and labor required; (2) the novelty and difficulty of questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by attorneys due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitation imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 717-19.

rates charged were reasonable and Koerner does not suggest the contrary. Defense counsels' fees were most apparently on a fixed basis. Additionally, no particular time constraints imposed by the nature of this case or the clients warrants an enhancement of the amount of fees due.

The Court finds that the results were obtained efficiently and a complete victory for the defendants, albeit little consolation third time around. The Court finds that while the attorneys were experienced and able and their work a reflection of such, their level of experience and ability is adequately compensated in their hourly rates. Accordingly, the experience, reputation and ability of the attorneys involved does not warrant any adjustment. As to undesirability of the case, other than the disturbing [*12] fact of and irritation associated with a lawsuit that keeps coming back from the roots, such does not justify an increase in attorneys' fees. Additionally, the nature and the length of relationship of the attorneys and their clients is also not a factor in this case.

As previously mentioned, $20,000 in attorney's fees is hardly unusual in a case which runs its course within approximately one year's time and is summarily disposed of without the necessity of an oral hearing. Whether this Court views this case as a whole or as itemized line items, reasonable attorney's fees approximating $20,000 is an appropriate and just result.

Koerner's submissions are woefully inadequate to suggest to that he is a hardship case. His 1996 individual tax return Form 1040 is incomplete and cannot support such an adjudication. Schedule C at item 26 indicates wages were paid in the amount of $121,334.00. Koerner's Form 1040 does not report income in the form of salary of approximately $121,334.00. Koerner did not attach a copy of his Form 1065, the original of which should have been appended to his 1996 Form 1040 when filed.

The Court, here reminds Mr. Koerner, that he was given the opportunity [*13] to avoid the imposition of any sanction by voluntarily dismissing this case within the 21-day "safe harbor" period provided by FRCP Rule 11. Instead of dismissing Koerner III (i.e., the challenged allegations), on August 14, 1997 Koerner attempted to recoup his own fees and costs expended in this matter. Whereas on August 14, 1997 Koerner represented in writing to defense counsel he had $20,000.00 in fees and costs invested in this matter, he currently pleads that his fees in this case amount to no more than $612.00. The Court notes that the time spent simply reviewing the submissions filed in connection with the fee applications presently before the Court well exceeded the 3.5 hours.

For all of the above and foregoing reasons, this Court is of the opinion that reasonable attorneys' fees and costs attributable to Koerner's FRCP Rule 11 violations which are the subject of this Court's prior rul-

ing entered September 15, 1997 amount to $19,395.78. Therefore, the Court GRANTS both attorneys' fee applications -- that is, Phelps Dunbar's application in the full amount of $13,168.28 and Crescent City E.M.S., Inc.'s application in the full amount of $6,227.50.

Accordingly,

IT IS ORDERED [*14] that Louis R. Koerner, Jr. is assessed attorneys's fees and expenses totalling $19,395.78 as FRCP Rule 11 sanctions.

New Orleans, Louisiana, this 10th day of November, 1997.

Charles Schwartz, Jr.
UNITED STATES DISTRICT COURT

(2)

No. 98-1047

Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

LOUIS R. KOERNER, JR. and MICHAEL SAMPSON, SR.

*Petitioners,*

*vs.*

CRESCENT CITY EMERGENCY MEDICAL SERVICES, INC., d/b/a MEDIC ONE; MEDIC ONE AMBULANCE SERVICE, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY; SUE BIROU; BONNIE EDWARDS,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS MEDIC ONE AMBULANCE SERVICES, INC., AMERICAN MEDICAL RESPONSE, INC., JERRY VARANAY AND SUE BIROU

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## STATEMENT PURSUANT TO RULE 29.6

In accordance with Rule 29.6 of the Supreme Court of the United States, respondents state that the parent company of Medic One Ambulance Services, Inc. and American Medical Response, Inc. is Laidlaw, Inc., a company which issues shares to the public.

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## STATEMENT OF THE CASE

### A. Introduction.

The petition misstates facts and misconstrues both the Fifth Circuit's holding and those of other circuits that purportedly "conflict" with the opinion below.

To fully understand the futility of petitioner's claim, it is necessary to briefly trace the procedural history of this case, which includes other suits filed by petitioner that arose from the same allegation of fraud. In October of 1990, Priority E.M.S. ("Priority") filed two suits against its competitor, Crescent City E.M.S., Inc. ("Crescent City"), in Louisiana state court, alleging unfair trade practices. Crescent City was accused of filing fraudulent claims for reimbursement for unnecessary ambulance services rendered to dialysis patients at Charity Hospital in New Orleans.

On November 7, 1991, the president of Priority, Michael Boatright, and his attorneys, Michael Piper and Louis Koerner, petitioner, incorporated Federal Recovery Services, Inc. ("FRS"). Just five days later, FRS filed a sealed complaint attempting to state a claim in the name of the United States of America against Crescent City, and other defendants ("Koerner I"). On March 3, 1993, the United States elected to intervene in the suit pursuant to 31 U.S.C. § 3730(b)(4), which gave the United States control over the litigation. Nevertheless, two and one-half years after filing the complaint, FRS attempted to amend the complaint to allege additional fraudulent actions by Crescent City.

On June 2, 1993, Crescent City moved to dismiss FRS for lack of subject matter jurisdiction because it was not the original source of the information, inasmuch as Priority had filed a state

case alleging the same facts in 1990. In an attempt to cure the jurisdictional defect, FRS filed a motion to substitute Boatright as the relator. The District Court denied the motion to substitute Boatright and granted Crescent City's motion for dismissal.

The United States then proceeded against Crescent City. Before trial, a settlement was reached in which Crescent City paid the United States over $1.8 million, and the suit was dismissed pursuant to Rule 41(1)(1)(ii) of the federal Rules of Civil Procedure. The United States agreed to pay FRS, Boatright, Koerner, and Piper 10% of the proceeds recovered ($186,250) from Crescent City which released their claims against the United States.

That same day, FRS and Boatright, after having been dismissed from Koerner I for over a year, sought reconsideration of the motion that had dismissed them from the suit against Crescent City. This motion for reconsideration was denied. Additionally, Koerner and Piper filed motions for attorneys fees in excess of $190,000. The court held that they were not entitled to attorneys' fees because FRS was not a proper party, and noted that there had been no finding that Crescent City had violated the False Claims Act. Koerner and Boatright subsequently appealed the dismissal of FRS, the denial of substituting Boatright as the relator, and the denial of attorneys fees.

The Fifth Circuit Court of Appeals held that pursuant to 31 U.S.C. § 3730(d)(1), FRS was not a proper party, and accordingly, Koerner and Piper were not entitled to attorneys fees and expenses. The court further held that, because Priority had filed suit in state court a year prior to FRS's suit, the information contained in Koerner I were "public disclosures" within the meaning of the statute. FRS admitted as much in its Motion to Partially Lift Seal, filed on August 10, 1992, noting that

> [t]he claim of Priority E.M.S., Inc. against Crescent City E.M.S., Inc. for unfair trade practices is based upon the same factual matters as the claim against Crescent City E.M.S., Inc. in this proceeding.

FRS argued that there was only one common instance of fraud shared by the cases, and that the federal case alleged additional instances. The court disagreed because the *qui tam* action was based, even if only partly, upon publicly disclosed information, and FRS could not avoid the jurisdictional bar simply by adding other claims substantively. The court held that FRS was not the "original source" even if additional, but similar, information was uncovered by FRS. Additionally, the court noted that FRS had not provided the information to the Government prior to filing suit, as required by 31 U.S.C. § 3730(e)(4).

The court stated in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 453 (1995), that "FRS's origins and capital structure suggest that the attorneys created FRS to control the proceeds of this litigation." The subsequent case history underscores the truth of the court's observation, and what is motivating petitioner's request for review. The court admonished the attorneys by stating that "a lawyer must represent his client's interest, not his own. The attorneys' effort to control Boatright by creating FRS overreached, and the resulting loss of counsel fees is its price." *Id.*

In September of 1994, prior to the Fifth Circuit's ruling in Koerner I, Crescent City sold the assets of its New Orleans based Medic One Ambulance operations, as well as the right to use the name "Medic One," to Medic One Ambulance Services, Inc. (Medic One), an affiliate of American Medical Response, Inc. (AMR). Medic One subsequently hired most of the employees of Crescent City's ambulance operations in New Orleans.

In March of 1995, some nine months prior to the Fifth Circuit's ruling in the Federal Recovery Services case ("Koerner I"), Koerner filed his second *qui tam* suit against Crescent City and Jerry Varanay. This second *qui tam* suit (Koerner II) also named as additional defendants, Medic One, AMR, Birou and Edwards. In Koerner II, Koerner alleged that he (Koerner) obtained the information upon which Koerner II was based from Sampson, a former employee of Crescent City when it did business as Medic One, and from Koerner's own investigation. Koerner additionally alleged that he (Koerner) was the original source to the United States of the information set forth in Koerner II, and further that

> the Medic One defendants, throughout a period beginning no later than June, 1993, to the personal knowledge of Michael Sampson, Sr. and on information and belief, beginning on October 1, 1990, and continuing through the period thereafter until the present, presented and/or caused to be presented false and/or fraudulent claims to the United States of America . . .

At the evidentiary hearing held on August 28, 1996, in Koerner II, Sampson testified that he did not commence work for Crescent City until June of 1993, and his attorney (Koerner) stipulated that Sampson did not have personal knowledge of fraudulent claims being made to the government after his termination in August of 1994, one month prior to Crescent City's sale of its ambulance related assets to Medic One. Sampson additionally testified that he (Sampson) had authorized Koerner to file Koerner II in his (Sampson's) name, and that prior to the filing of this suit he (Sampson) had not submitted any documents or other information to the U.S. government.

Just as in Koerner I, Koerner attempted to cure the jurisdictional defect in Koerner II (lack of standing as an

original source) by swapping plaintiffs. The trial court rejected Koerner's attempt to substitute Sampson as relator, and dismissed the Complaint in Koerner II for lack of subject matter jurisdiction. Additionally, the trial court imposed monetary sanctions against Koerner pursuant to FRCP Rule 11 in the form of attorney's fees and expenses. Koerner appealed the dismissal in Koerner II. The Fifth Circuit, in an unpublished opinion (See Appeal No. 96-31126), dismissed Koerner's appeal as being frivolous, and issued a sanction warning to Koerner relative to the filing of future frivolous appeals.

On the same day that Koerner filed a notice of appeal in Koerner II (October 28, 1996), he filed a third *qui tam* suit (Koerner III) under seal. The Complaint in Koerner III was nearly identical to the Complaint in Koerner II, the only differences being a change in plaintiff from Koerner to Sampson, and a shortening of the time frame of the alleged Charity Hospital Bribery Scheme to coincide with Sampson's employment with Crescent City from June, 1993 until August, 1994. The bribery schemes alleged in Koerner II and III were mere continuations of the scheme alleged in the state court suits filed in 1990. The document submissions made by Sampson to the government in connection with Koerner III occurred over five years after the public disclosures made in the state court suits, and were "based upon" said disclosures. At the evidentiary hearing held by the trial court in Koerner II, Sampson admitted that prior to retaining Koerner, he (Sampson) had discussed with Michael Boatright the allegations of illegal ambulance transports contained in Koerner I, as well as in Boatright's two prior state court suits. The duration of the scheme alleged by Sampson in Koerner III (June, 1993 to August, 1994) is overlapped by the time period alleged in Koerner I (January, 1989 to September, 1994).

Again, the District Court dismissed Koerner III for lack of subject matter jurisdiction, and imposed monetary sanctions

against Koerner pursuant to Fed. Rules of Civ. Proc. Rule 11 in the form of attorneys fees and expenses. Once again Koerner appealed. The Fifth Circuit had already warned Koerner that "any future frivolous appeal filed by him or on his behalf will invite the imposition of sanctions." *United States v. Crescent City E.M.S.*, No. 96-31126, slip op. at 2 (5th Cir. Aug. 19, 1997). The appeal of the dismissal of Koerner III and the trial court's imposition of sanctions was upheld, with the Fifth Circuit additionally imposing its own sanctions of double costs and attorneys fees in defending the appeal, and remanding the case to the trial court for determination of costs and fees. Koerner filed an Application for Panel Rehearing asking that the Fifth Circuit determine the amount of sanctions to be awarded and indicating that attorneys fees of $7,224.61 was an appropriate amount. The Fifth Circuit granted Koerner's Application for Panel Reconsideration and awarded attorneys fees in the exact amount that Koerner had stated was a fair award.

**B. The Petition Misrepresents the Statement of the Case.**

Petitioner continually states throughout his Petition that Michael Sampson was the "original source" for the Complaint in Koerner III, based on petitioner's misguided belief that the only defect in subject matter jurisdiction was that the Government had not received the information forming the basis of the Complaint prior to its filing. However, this is a misstatement: Sampson never was, nor could be, the original source of Koerner III. Koerner III is based on the exact same facts as the state court cases filed by Priority in 1990, only the names and dates have changed. To be the original source, Sampson must have "sounded the alarm, not merely echoed it."

The District Court and the Fifth Circuit Court of Appeal have repeatedly told petitioner that all complaints subsequent

to the state court suits that stem from the same allegations are based on publicly disclosed information. Petitioner just does not seem to understand that he has already gotten his one bite of the apple.

Petitioner states that it is "clearly erroneous" that Sampson did not notify the Government until six years after the same information had been publicly disclosed. This is a misstatement and a red herring. The information on the Medicaid scheme was publicly disclosed when the state court suits were filed in 1990. Sampson sent his information, which was based on the same facts and allegations, by petitioner's own admission, in 1996. Therefore, it is a fact that Sampson notified the Government six years after the information had already been publicly disclosed in the state court suits.

Koerner states that Sampson had personal knowledge of how the scheme to defraud Medicaid worked, and that knowledge proves that he was the original source. What Koerner conveniently omits is that Sampson met with Boatright, who explained the fraudulent scheme to him, prior to the filing of Koerner II. Petitioner claims that Sampson demonstrated to the District Court that he was an original source. Yet, petitioner contradicts this claim with the sworn testimony that he includes from the district court hearing in which Sampson testified that he spoke to Boatright about Boatright's lawsuit against Crescent City.

Nevertheless, all these arguments are red herrings because Sampson is not an original source as contemplated by 31 U.S.C. § 3730(e)(4). Every federal complaint filed alleging fraudulent ambulance transports of dialysis patients from Charity Hospital, whether filed by Priority, Koerner himself, or Sampson, have no subject matter jurisdiction, because the fraud was publicly disclosed in the state court suits filed with Koerner as attorney

for Boatright. The District Court and the Fifth Circuit have explained, again and again, to petitioner, that there can never be subject matter jurisdiction on the same allegations for the above reasons. Yet, petitioner repeatedly attempts to enter the federal courts by any door he can find, only to have that door shut over and over again.

**C. The Petition Misrepresents the Facts of the Case.**

Although petitioner misconstrues a multitude of the facts, only those of moment will be addressed in this section. Petitioner states that Sampson had notified the Government prior to his (Koerner) filing Koerner II. This is false. Petitioner evens admits that he, not Sampson, sent the information to the government. Merely because duplicate materials were sent about a year and a half later by Sampson does not alter the fact that Koerner, not Sampson, sent the information to the Government in Koerner II. Then, petitioner falsely states that Sampson refused to authorize the filing of the *qui tam* suit, despite the fact that Sampson had testified otherwise. These facts are false and irrelevant, as there was no subject matter jurisdiction because the information had already been publicly disclosed. Petitioner's credibility based on these misrepresentations is suspect.

**D. The Petition Misstates the District Court's Reasons for its Judgment.**

Koerner asserts that the trial court refused subject matter jurisdiction in Koerner II, and did not find Sampson to be an "original source" because the information contained therein had not been provided to the Government prior to his filing suit as required by 31 U.S.C. § 3730(e)(4)(B). Koerner alleges that the trial court erred in this finding because he had sent the Government the material. The argument is without relevance

because the District Court never ruled on, nor even addressed, whether Sampson was an original source. Rather, it held that Koerner, who had filed the suit, was not an original source, and that adding Sampson as plaintiff could not cure the jurisdictional defect, and that the events alleged in Koerner II were derived from and based on the earlier publicly disclosed allegations in the FRS suit.

## REASONS FOR DENYING THE WRIT

### I.

### THE PETITION MISSTATES RULE 38, AND PETITIONER HAD BEEN PROVIDED NOTICE.

Petitioner avers that the appellate court was without authority to award sanctions against him because "there was no separately filed motion or notice form [sic] the court and reasonable opportunity to respond." Petitioner's argument is without merit because he had received notice.

Federal Rule of Appellate Procedure 38 provides as follows:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. Rule App. Proc. Rule 38.

Koerner received notice on more than one occasion and had more than a reasonable opportunity to respond to the court's imposition of sanctions for filing a frivolous appeal. As this

Court stated in its ruling when the sanction was imposed, Koerner had been cautioned in Koerner II (Appeal No. 96-31126) that "any future frivolous appeals filed by him or on his behalf will invite the imposition of sanctions." Koerner II, Slip. Op. at 2. Furthermore, in the Application for Panel Rehearing, Koerner *asked* the Fifth Circuit to "impose an amount of sanctions for the appeal on the appellate level and without a remand," and also requested that the court award sanctions in the specific amount of $7,224.61. In its ruling On Petition for Rehearing, the Fifth Circuit did precisely what Koerner himself had requested.

The Second Circuit Court of Appeals has held that warnings by the court that sanctions would be imposed for filing a frivolous appeal, based upon prior frivolous filings by the appellant, is adequate notice and the imposition of sanctions is proper. *Becker v. Adams Drug Co.*, 819 F.2d 32, 33 (2d Cir. 1987), *cert. denied*, 484 U.S. 1015, 108 S. Ct. 719, 98 L. Ed. 2d 669 (1988). Other circuits have held that an appellant's reply brief devoted to responding to appellee's request for sanctions and a request in opposing briefs for sanctions also constitute adequate notice. *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 (6th Cir. 1995); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1583 (C.A.D.C. 1991).

Not only did Koerner have express notice in Koerner II that filing another frivolous appeal would result in an imposition of sanctions, he also had notice in this case, Koerner III, as evidenced by his unequivocal request to the court in his Application for Panel Rehearing to reconsider the sanction award. Therefore, the appellate court did have the authority to impose sanctions on petitioner.

## II.

## THE PETITION MISSTATES THE EXISTENCE OF A CONFLICT.

Petitioner seeks certiorari based on a conflict that does not exist. He asserts that the holding in *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) specifically declined to follow the procedures to cure a subject matter jurisdictional defect as approved by *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 31 F.3d 1015 (10th Cir. 1995). He avers that this, in turn, creates a conflict as to whether a mistake in subject matter jurisdiction can be rectified by subsequent compliance with the mandated procedure **by the original source**. (Emphasis added).

Petitioner's argument is without merit because the cases are distinguishable. The Fifth Circuit held that Boatright could not be added to create subject matter jurisdiction where none actually existed. *Federal Recovery Services, Inc. v. United States*, 72 F.3d at 453. The court noted that FRS had only incorporated five days prior to the filing of suit, and had made no showing that it had voluntarily provided the information to the Government before filing its action. *Id.* at 452, n.3. Such disclosure is needed:

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and **has voluntarily provided the information to the Government before filing an action under this section which is based on the information** (emphasis added).

31 U.S.C. § 3730(e)(4)(B).

In *Precision*, the plaintiffs had supplied the government with the requisite information before filing the second suit. Therefore, by adding the two individuals who had uncovered the fraud to the second suit, the subject matter jurisdictional defect was cured. However, in *Recovery*, adding Boatright, who was the individual who had uncovered the fraud, as a plaintiff would not have made him an original source because 31 U.S.C. § 3730(e)(4)(B) requires voluntary disclosure to the government prior to filing suit in order for an individual to be considered an "original source."

Thus, the facts in the two cases differ significantly. Therefore, the Fifth Circuits' denying an amendment to add plaintiffs who could **not** cure the defect, is distinguished from the Tenth Circuit that allowed amending the Complaint which did, in fact, cure the defect.

## III.

## THE PETITION MISSTATES THE CONFLICT ON "ORIGINAL SOURCE."

Once again, in an attempt to create a conflict where none exists, petitioner misstates holdings on "original source." He claims that the appellate court in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996) reversed a District Court's finding that there was no personal knowledge, the plaintiff was not the original source, and that there was no subject matter jurisdiction. Actually, the above case affirmed the District Court's granting summary judgment. Petitioner apparently meant to refer to a previous appellate court ruling in the same case in which the plaintiff was found to be an "original source" because **prior disclosures had been based on his complaints**. These facts differ from Koerner II and Koerner III in which the prior disclosures were **not** attributed to disclosures by either Koerner or Sampson.

Also, the holding in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994) does not conflict with the Fifth Circuit, despite petitioner's claim. In *Cooper*, the court held that "once a suit has been filed by a relator or by the government, all other suits against the same defendant based on the same kind of conduct would be barred." *Id.* at 567. This is exactly what the Fifth Circuit has consistently held. All of the suits, *i.e.* Koerner I, Koerner II, and Koerner III, allege ambulance fraud by the same ambulance companies who transported dialysis patients from Charity Hospital. Therefore, Sampson is not an "original source" even though he adds names of new patients and cites other instances of the same alleged fraudulent scheme.

Additionally, *Cooper* had a different outcome because the facts were different. Cooper had gathered evidence and contacted governmental representatives about the fraud prior to the hearings at which the fraud was publicly disclosed. In Koerner III, Sampson filed suit years after the state court suits had been filed, and only after he had discussed the suit with the original plaintiff, Boatright. Conversely, Cooper had investigated the fraud three years prior to the public disclosure, and had notified certain government officials prior to the public disclosure. Based on those reasons, the Court found that Cooper's information was direct and that he was an "original source." Sampson, on the other hand, had learned of the previous suit from Boatright well before Sampson filed Koerner III. The District Court and the Fifth Circuit were correct, under *Cooper*, in holding that Sampson is not an "original source." Petitioner claims there is no statutory basis for this conclusion. However, his claim ignores the fact the it is the court's obligation to interpret the law. The holding in Koerner III is based on the courts' interpretation of 31 U.S.C. § 3730(e)(4)(A), and what is required for a finding of "original source."

Finally, petitioner erroneously cites *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) for support that Sampson was an original source. In *Springfield*, the court held that there had been no public disclosure because the previously disclosed information was "innocuous," "spotty," and "insufficient in itself to constitute an allegation of fraud." *Id.* at 657. That certainly was not the case in the state court suits filed by Boatright, Koerner, and Piper as it was prosecuted. Therefore, *Springfield* differs in fact from Koerner II and Koerner III, and does not create a conflict over the definition of "original source."

## IV.

## THE DISTRICT COURT CORRECTLY DISMISSED KOERNER III FOR LACK OF SUBJECT MATTER JURISDICTION.

Petitioner asserts that there was no authority for the District Court to dismiss a claim of an "original source," and therefore, the District Court went beyond its authority when it dismissed Koerner III. Petitioner then takes his argument one step further, and avers that because Sampson claimed to be an original source, petitioner's appeal of the District Court's ruling was not frivolous.

### A. Sampson was not an original source.

Petitioner's argument ignores the obvious fact that Sampson was not an "original source" of the fraudulent scheme that had been prosecuted some six years prior to his filing suit in Koerner III. The District Court and the Fifth Circuit had made it abundantly clear to the petitioner that the *qui tam* action based on fraudulent ambulance services and claims for reimbursement had been settled. All other claims based on the

same allegations were barred because the court had no subject matter jurisdiction over such claims.

**B. The petitioner's appeal was frivolous.**

For petitioner to assert that his appeal was not frivolous after being admonished by the Fifth Circuit not to continue filing the same suit again and again is incredible. The amount of time that has been wasted by the courts, and the money spent by defendants is considerable in defending against the onslaught of copy-cat suits filed by Koerner. As the trial court aptly stated,

> The tortious trail swathed by Koerner in serially relating through himself and others allegations of false claims in triplicate has resulted in anything but a just, speedy, and inexpensive determination of the action.

(See Appeal No. 96-31126). The Fifth Circuit reviewed the pleadings of Koerner I, Koerner II, and Koerner III and found them to be almost identical. The Court also found that sanctions appears to be the only way to stop Koerner from filing replicate suits. It was correct in imposing sanctions.

## CONCLUSION

Petitioner, after being warned and then sanctioned by the Fifth Circuit for attempting to file suit for which there is no subject matter jurisdiction, now attempts to misstate the facts and holdings in order to justify review by this Honorable Court. A reading of the pleadings and prior rulings makes it abundantly clear that petitioner is willing to waste the resources of the legal system in search of more money. In Koerner I he received a settlement from a suit alleging the same fraudulent scheme that he subsequently alleged in Koerner II and once again in Koerner III.

Petitioner has cited no compelling reason for review of the holdings of the lower courts. For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of *certiorari* should not issue.

Respectfully submitted,

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